No. 42334-1-II

COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

GARY A. TOLLEFSEN,

Appellant,

vs.

VALERIE D. TOLLEFSEN,

Respondent.

APPELLANT'S REPLY BRIEF

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I. REPLY ARGUMENTS

1. GARY TOLLEFSEN PROPERLY AND TIMELY APPEALED THE FINAL DECISION OF THE TRIAL COURT.

Respondent seemingly asserts that Gary's appeal from the June 3, 2011 written orders of the court is somehow fatally flawed because appellant Gary Tollefsen allegedly missed mandatory appeal filing deadlines for orders dated May 10, 2010, August 12, 2010, and October 18, 2010. In assessing the invalidity of respondent's assertion, it is important to look to the language of those orders, the supporting transcripts, and the motions then pending.

Rule of Appellate Procedure 2.2(1) defines those court actions that are appealable as a matter of right. As potentially applicable to the case at hand, only the following possibilities are relevant:

> (1) . . . The final judgment entered in any action or proceeding, regardless of whether the judgment reserves for future determination on award of attorney fees or costs.
>
> (2) . . . Any written decision affecting a substantial right in a civil case that in effect prevents a final judgment or discontinues the action.

RAP 2.2(a)(1) & (3). These limited possibilities do not apply to any of the listed orders.

The May 2, 2010 order of the court was nothing more than an order setting pending motions for an evidentiary hearing, maintaining the status quo pending hearing. CP 15. The only motion that had been filed and put on the table as of that date was Mr. Tollefsen's April 15, 2010 Motion to Suspend Child Support on an interim basis based upon the fact that the child was not then attending school. CP 13-14. That motion did not raise any request for termination of the support obligation. Respondent's Petition/Motion for Child Support to Continue was not before the court on May 10, 2010, because it was not even filed until May 11. CP 16-17. Thus, the May 10, 2010 court order was not a final, appealable order by any stretch of the definition.

The order of August 12, 2010 was entered on the rescheduled evidentiary hearing date for the father's April motion, and was premised upon the father having been just informed that the child had apparently obtained her GED certificate by July 2010. The order did expressly set forth that "the father's motion to suspend regular child support is withdrawn as now moot." CP 18-19. The order did also state that the father's support obligations would cease 30 days after the ordinary termination date. CP 18-19. That language was meaningless as 30 days after a July GED hearing would be August, and post-majority support--be it required or voluntary--had already been paid through August. CP 25, l 3.

The father did not seek reimbursement of any amounts paid or overpaid as of that date. Circumstances of the child's post-secondary educational plans were completely unknown to the father at that time, with no evidence of either application to any school, or acceptance by any school, then being disclosed by either the mother or the child. CP 22-23.

The mother's petition to extend post-majority support, while legally deficient as to form and process, was not yet before the court and was not on for hearing August 12. CP 23, l 17-21. In essence, the August 12, 2010 order simply reflected the status quo. It was not determinative of any final status.

The October 18, 2010 order simply directed that "this matter shall be set for trial," and again required continued base child support payments to be made "pending a final determination of support obligations at time of trial." CP 100. The matters then pending included the father's motion to review, interpret, or clarify any post-secondary support obligation based upon facts arising since August 12, 2010. CP 33-99. The mother's motion to extend post-majority support was also still on the table, as it had not previously been resolved.

Judge Godfrey on October 18, 2010 directed that several issues be researched including: whether a GED is equivalent to a high school diploma, RP 9, l 19, whether continuous high school education is an

implicit requirement of a support order (i.e., the obligation already terminated argument), RP 9, l 20-21, whether Phoenix University was an acceptable institution, RP 9, l 22- RP 10, l 9, evidence of any disability of the child and income based upon that disability, RP 10, l 10-21, and the reasonableness of the child's educational plans, RP 10, l 22- RP 11, l 23. Judge Godfrey expressly stated that it was a possibility that he would be ordering reimbursement of any support paid by the father. RP 11, l 15-21. All of these issues were consistent with the father's motion filed September 9, 2010 regarding post-secondary support review, interpretation and clarification. Obviously, the October 18, 2010 order was not a final order.

Thus, none of the orders dated May 10, 2010, August 10, 2010, or October 18, 2010 were judgments or decisions determining the action from which there was a right to appeal under Rule of Appellate Procedure 2.2. Arguably, portions of these orders might have been decisions under which *discretionary* review could have been possible under Rule of Appellate Procedure 2.3. Thus, the considerations governing acceptance of discretionary review should be applied and analyzed. Those considerations include whether the order constituted "obvious error which would render further proceedings useless" or "probable error . . . (which) . . . substantially alters the status quo or substantially limits the freedom of a

party to act.", whether the order constituted a departure "from the accepted and usual course of judicial proceedings", or whether the order required immediate review by certification of the superior court or stipulation of all parties involving a controlling questions of law. RAP 2.3(b)(1-4). None of these circumstances apply. Discretionary review was therefore neither an option, nor a necessity.

Therefore, appeal from the rulings based upon the final evidentiary hearing of May 27, 2011, as reflected in orders entered on June 3, 2011, was the only appropriate point at which appeal as a matter of right could be taken by either party. The father's Notice of Appeal was timely filed within thirty days of entry of the Findings of Fact and Conclusions of Law. Respondent's argument that necessary appeal dates were missed is baseless and frivolous.

2. GARY'S POST-SECONDARY SUPPORTI MOTION WAS NEITHER A PETITION TO MODIFY NOR A PETITION TO ENFORCE THE 2003 CHILD SUPPORT ORDER TERMS, BUT INSTEAD A MOTION TO REVIEW, CLARIFY, OR INTERPRET THE TERMS OF THAT 2003 CHILD SUPPORT ORDER

Respondent premises several assignments of error and arguments on the erroneous assertion that the motions before the trial court constituted either a petition to modify child support (Respondent's

Assignments of Error 9, 13, 14; Respondent's Arguments 2, 5, 6) or a petition to enforce the child support order (Respondent's Assignments of Errors 9, 13; Respondent's Arguments 5, 6).

Actually, the only three motions ever presented by either of the parties during the pendency of the action before the trial court, between April, 2010 and June, 2011, were all designated as, and presented as, motions. This includes Gary Tollefsen's Motion to Suspend Child Support filed April 19, 2010, CP 13-14, Valerie Tollefsen's Petition/Motion for Child Support to Continue, filed May 11, 2010, CP 16-17, and Gary Tollefsen's Motion and Affidavit Re Post Secondary Support, filed on September 9, 2010. CP 33-99.

There were never any proper petitions to modify the support obligation or to enforce the support obligation before the trial court at any time. While Valerie's motion was essentially an untimely and improperly presented motion to modify, both of Gary's motions were essentially motions to review, interpret, or clarify the 2003 Order of Child Support provisions. This is not the same as a petition to modify.

> "A decree is modified when a party's rights are either extended beyond or reduced from those originally intended in the decree. *Rivard v. Rivard*, 75 Wn.2d 415, 418, 451 P.2d 677 (1969). A clarification is "merely a definition of the rights which have already been given and those rights may be

> completely spelled out if necessary." Rivard, at 418. Construction of a decree presents a question of law to be determined from examining the document itself to determine its intended effect. In re Marriage of Gimlett, 95 Wn.2d 699, 704-05, 629 P.2d 450 (1981)."

In re Marriage of Jarvis, 58 Wn.App. 342, 345, 92 P.2d 1259 (1990)

In such situations, it is within the trial court's discretion to require oral testimony, Rivard, supra at 491, specifically citing Civil Rule 43(e). Ibid. Civil Rule 43(e)(1) provides "when a motion is based on *facts not appearing of record* the court may hear the matter on affidavits presented by the respective parties, but the court may direct the matter be heard wholly or partly on oral testimony or depositions." CR 43(e)(1) (emphasis added).

In Rivard, the parties were unable to agree what constituted "reasonable visitation rights", the visiting party had the right to have the court specifically spell out those rights, and such action constituted a clarification of the decree, not a modification. Rivard, 75 Wn.2d 415, at 419.

The evidentiary hearing that finally occurred herein on May 27, 2011 was ordered by the court on October 18, 2010, with counsel specifically directed to brief certain legal issues, and to present additional factual evidence. RP 9-11. This was nothing more than a discretionary

requirement of the trial court before any interpretation or clarification of the existing child support order was made.

The trial judge specifically called for evidence pertaining to whether a GED is equivalent to graduation from high school, RP 9, l 16-19, continuous high school completed by age 18, RP 9, l 19-21, RP 9, l 22-RP 10, l 3, whether the chosen program was full time, RP 10, l 4-9, any disabilities of the child, RP 10, l 10-14, whether the child qualifies for disability income, RP 10, l 14-17, the educational goals, disability income, RP 10, l 22-RP 11, l 3. The trial judge also clearly indicated he was temporarily ordering basic child support to continue pending hearing, RP 11, l 6-13, but that payments made might ultimately be reimbursable back to the father. RP 11; l 17-21.

This was neither a modification action nor an enforcement action, so any procedures or requirements pertaining to either of those alternatives are applicable. This means that no finding of adequate cause was necessary, no finding of change of circumstances was necessary, and a requirement to impose attorney fees did not exist. Any argument of Respondent premised on categorizing Gary's motions as petitions to modify is erroneous.

3. THE FINDINGS OF FACT AND CONCLUSIONS OF LAW ENTERED ON JUNE 3, 2011 WERE APPROPRIATE, ACCURATE AND WITHIN THE DISCRETION OF THE TRIAL COURT

Respondent raised numerous additional objections, assignments of error, and arguments pertaining to the validity or basis of several of the Findings of Fact and Conclusions of Law entered on June 3, 2011. All of these objections, assignments of error, and arguments, are entirely without merit.

First, Respondent asserts that mere reference in the order to the father's Motion to Suspend Child Support, and the mother's Motion for Child Support to Continue, was somehow reversible error.

Respondent accurately points out that the father's motion was agreed to be moot in the August 12, 2010 order, which order was entered without evidentiary hearing. CP 18. It is important, however, to look to the transcript of that date to realize that the father was merely acknowledging that the child had obtained her GED certificate as of July 2010, and that since he already paid child support for August 2010, and there was no indication that the child would immediately be attending college, he was satisfied with the overall child support situation as of that date. He was not seeking reimbursement of any amounts paid or potentially overpaid. CP 22-23. The August 12, 2010 order did purport to

'extend' the father's obligation to pay post-majority child support for thirty days after the child completed high school, via a GED, but that would have been through the month of August 2010, and had already been paid, so was a meaningless provision. All of these facts were relevant to the later post-secondary support motion.

Also, these facts and others relevant to the first motions raised by both parties were among the topics the judge directed the parties to address at the May 2011 evidentiary hearing, CP 9-11. These facts were addressed in respective trial briefing of the parties for the May 27, 2011 evidentiary hearing. CP 101-114; CP 164-174.

Further, the trial judge, in his oral ruling of May 27, 2011, expressly stated "I've read the whole file," CP 160, l 6, which obviously included the April 2010 and May 2010 motions, and supporting written materials. Thus, it was proper to reference both early the motions as forming part of the basis for the findings and conclusion.

Also, Judge Godfrey on May 27, 2011 did address Respondent's May 2010 Motion to Continue Post-Majority Support as follows: "Now, what I am going to order is you will continue to pay the sum of $1,000.00 a month until further court order." RP 164, l 19-20. While Respondent inexplicably did not include this significant modification (without proper supporting petition or other documentation) in the final written orders, it

speaks to whether both the mother's May 2010 motion, was still on the table at trial. The oral ruling, and the written June 3, 2011 order, merely reflect that those early motions were considered in arriving at the final decision.

Second, the mother assigns error to several findings of fact as allegedly not being supported by the record. These include when the child stopped attending high school (Assignment of Error 2), when the child might have last been in GED classes (Assignment of Error 3, 5), when the child might have been enrolled full-time in any non-post-secondary educational endeavor (Assignment of Error 4), when her mental health issues were first diagnosed (Assignment of Error 6) and the father's numerous objections to the choice of University of Phoenix (Assignment of Error 7). In support of these allegations of error, the mother points to either no evidence at all, or, at best, vague language in the record that "may" be inconsistent with the specific citations offered by the father in his initial brief.

The general standard of review when factual findings are challenged is whether substantial evidence supports the finding made. *State v. Jeannotte*, 133 Wn.2d 847, 856 (1997). A finding of fact will not be overturned unless supported by substantial evidence. *Thorndike v.*

Hesperian Orchards, Inc., 54 Wn.2d 570, 575 (1959). Where Respondent has cited no specific contrary evidence in the record, clearly there is not substantial evidence to set aside a finding of fact.

Third, Respondent challenges five of the six Conclusions of Law; excepting only Conclusion of Law 4 pertaining to the best interests of the child--which probably should have been designated as a finding of fact.

Judge Godfrey orally made several references to the fact that Mr. Tollefsen's support obligation should have legally terminated as of November 2009. Judge Godfrey went on to expressly state that "theoretically and legally the day she (the child) quit (high school) in November of 2009 his (the father's) obligation stopped. The game was over." CP 162, l 2-4. "As of November of that year he didn't owe . . . a dime." CP 162, l 14-15.

There is no question but that Respondent did not timely file or serve a proper petition, with all necessary supporting documentation, to modify and extend post majority non-post-secondary child support, prior to November 2009 when the child dropped out of high school, after attaining 18 years of age. No such document exists in the file, Respondent's own brief sets forth several deficiencies of process that she attributes to Petitioner's post-secondary support clarification motion,

which clearly apply to her own motion. The conclusion that the mother did not timely or properly file her petition to modify is necessary and justified by the record.

Conclusion of Law 3, pertaining to the validity of a post-secondary support order entered when a subject child was 11 years of age was central to the father's legal argument. Case law indicates, that as a matter of public policy, an eleven year old is not proper fodder for post-secondary education support provision. *Marriage of Studebaker*, 36 Wn. App. 815 (1984). The reason is simple--circumstances of college cannot be determined at age eleven. Here, we had a provision for college, entered when the child was just eleven years old. The validity of such a provision was previously brief. A conclusion of law was necessary and appropriate.

Conclusion of Law 5, relieving the father of any of the costs at the University of Phoenix was the entire basis of the father's September 2010 motion that was clearly before the court for hearing. The father's September 2010 motion set forth several objections to the choice of Phoenix University, including many pages of supporting documentation. The father had moved to review, interpret, and clarify the applicability of that provision in light of the facts of the case, particular those facts newly arising in the last half of the month of August, 2010. the child's sudden,

unexpected choice of an extremely expensive 'for profit' on-line college was never a contemplated result – in 2003, or any other time. Review, post-secondary support provisions was necessary and appropriate.

Finally, adjusting the father's post-secondary support obligation for specific conditions did reflect the court's ruling, the totality of the evidence, including the allegedly disabled child's refusal to seek social security disability income. Conclusion of Law 6 was an appropriate judicial response to the circumstances herein.

4. NO FURTHER AWARD OF ATTORNEY FEES IS APPROPRIATE.

Respondent assigns error to the trial court declining to award her attorney fees after the May 2011 evidentiary hearing, and requests an award of attorney fees on appeal. In support of these requests, respondent completely misrepresents the procedure in the trial court and projects the label of intransigence on Gary Tollefsen when the label should properly rest on her own shoulders. Respondent also ignores the fact that she was awarded attorney fees through the August 2010 date, based solely on Gary's ability to pay.

Respondent asserts that attorney fees are mandatory in an action to enforce a support order under RCW 26.18.160. There was no such motion

ever before the court, so this citation does not apply. Respondent further references, as somehow significant, that she brought a motion to present oral testimony for payment of support at some point. **Appellant is completely unaware of any such pleading.** Respondent further asserts that the discretionary statutory language allowing an award of attorney fees in a modification action somehow mandates an award in this particular case. Gary's motion was not a modification action, so this statute also does not apply.

Respondent asserts intransigence as a justification for an award of fees, based upon Gary initially asking to have his non post-secondary obligation merely suspended at a time when the child was not attending school, and then later immediately asking for review, interpretation, and clarification of his post-secondary support obligation. Respondent fails to acknowledge that Gary, all along and even to this date, has continued to pay $1,000.00 per month basic, post-majority child support, aside from any cost of Phoenix University.

Respondent fails to acknowledge that Gary's support of his estranged child has been more than generous throughout, and that his legal motions have been factually and legally justifiable.

First, the base child support obligation of $1,000.00 per month, dating from 2003, was agreed and was higher than the standard calculation

obligation of $882.32 per month. CP 3, 4. Second, Gary's initial motion to suspend his post-majority support obligation was generous in that he could have requested a termination of his obligation at that time based upon the fact that the child was over 18 years of age, had not graduated from high school, was not attending high school, and was not then attending any post-secondary educational institution on a successful full-time basis. CP 13-14. As previously noted, Judge Godfrey made clear and unequivocal findings that Gary's complete support obligation could have terminated as early as November 2009. RP 161, l 11-RP 162, l 7. Third, Respondent completely ignores that as of August 11, 2010 the child had announced no applications to, or acceptance by, any post-secondary institution to her father for the school year that would have commenced in August or September 2010, and had left the father only with the expectation that she might be attending a local community college, before she suddenly demanded full payment for an expensive "for profit" on-line college that is quite well publicized to engage in shady practices, including offering worthless degrees to students. CP 33-99. Respondent would ignore the fact that the trial judge heard evidence on all of these issues, and far more related testimony, before reaching his decision that included completely excusing Gary from paying any portion of the cost relating to Phoenix University. CP 178-180; RP 160-166. Respondent, finally,

completely ignores the fact that the trial judge did not award attorney fees based upon the totality of the evidence at trial. This non-award of attorney fees was within the discretion of this trial court pursuant to relevant statutes.

Respondent has cited three different statutes as alleged authority mandating an award of attorney fees. Each of these citations is in error and/or not applicable to the circumstances at hand. RCW 26.18.160 provides, in its entirety:

> ***In any action to enforce*** a support or maintenance order under this chapter, the prevailing party is entitled to a recovery of costs, including an award for reasonable attorney fees. An obligor may not be considered a prevailing party under this section unless the obligee has acted in bad faith in connection with the proceeding in question.

(emphasis added). This was not an action to enforce by any stretch of the definition. There was no contempt citation. The only motion filed by respondent was a defective and untimely petition to *extend* post-majority support. Thus, RCW 26.18.160 does not apply to the case at hand and therefore does not mandate an award of attorney fees.

Respondent also cites RCW 26.09.140, which provides, in its entirety:

> The court from time to time after considering the financial resources of both parties ***may*** order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter and for reasonable attorney's fees or other professional fees in connection therewith, including sums for legal services rendered and costs incurred prior to the commencement of the proceeding or enforcement or modification proceedings after entry of judgment.
>
> Upon any appeal, the appellate court ***may***, in its discretion, order a party to pay for the cost to the other party of maintaining the appeal and attorney's fees in addition to statutory costs.
>
> The court ***may*** order that the attorney's fees be paid directly to the attorney who may enforce the order in his name.

(emphasis added). RCW 26.09.140 only makes award of attorney fees *discretionary* in any dissolution-related action, or the appeal therefrom. In exercising discretion, the trial court, and the appellate court, should consider more than the financial situation of both parties, but also the reasonableness of their position.

Finally, respondent also attempts to rely on RCW 29.09.175, which pertains to modifications of child support. It is not at all clear why this authority is cited as it contains no reference to attorney fees, except that respondent has repeatedly alleged procedural defects in the

modification process, when neither party timely or properly was pursuing a modification.

As repeatedly notes, Gary's post-secondary support ***motion*** was essentially a request to review, interpret, and clarify his post-secondary obligation under all of the facts at hand, which would have included not only the sudden in college plans in the last half of August 2010, but also the fact that his entire support obligation should have previously legally terminated. Even at the May 2011 evidentiary hearing, Gary indicated that he would have been satisfied paying the cost of the local community college, as was noted in Respondent's brief. While it is certainly true that the trial judge did only require to pay one-half the cost of a state institution, that ruling and conclusion of law is moot as the child has continued to attend Phoenix University when the father was clearly excused from paying any portion of the cost of that institution based upon all of the facts at hand.

Therefore, Respondent's request for attorney fees was properly denied by the trial court and should be denied by the appellate court.

CONCLUSION

The subject child support order herein was entered in 2003, when the subject child of the parties was just eleven years of age. The child support order, which was an agreed order, required the father to pay a

monthly amount in excess of the standard calculation amount, and also addressed post-secondary educational support by requiring the father to pay the full cost of education – which was then completely unknown and undetermined, plus the base support as post-majority support. The base child support amount was to terminate when the child reached 18 years of age or graduated from high school unless she was pursuing a post secondary education.

As the years rolled by, the child developed mental health and other issues and struggled in school. By November of 2009, a few months after her 18th birthday, the child dropped out of high school. The child did sporadically pursue a GED, which was apparently completed by July 2010.

When the father learned that the child was not attending high school in April 2010, instead of simply cutting off his child support payments, he brought a motion to suspend his obligation. By the time that motion came to hearing in August 2010, the child had completed her GED, but had no apparent college plans in the works. Up until this point, the father continued to pay his base support obligation, and had lead to believe that the child was only even considering enrolling at the local community college for post-secondary education.

By this date, in apparent acknowledgment that perhaps post-majority support should have already terminated, the custodial mother filed a motion to extend post-majority support in May of 2010. While this was clearly a modification request in that it asked that support continue past age 23. The modification process requirement were never satisfied, and the motion was filed after the father's child support should have legally and properly terminated under the terms of the existing orders.

At the August 2010 aborted evidentiary hearing, the trial court judge lectured the child about requirements for receiving post-secondary educational support. Within three weeks the child had enrolled at an on-line "for profit" university, at a fairly exorbitant cost. This situation was objected to by the father who immediately brought a motion to review, interpret, and clarify the post-secondary support obligations. After considerable delay in proceeding to evidentiary hearing, with the father paying post-majority support all along, trial was held and the judge agreed with the father's position on Phoenix University. The father was excused from paying any portion of the cost of Phoenix University. The child never pursued any other post-secondary institution, but has continued on at Phoenix University. Pursuant to existing court orders, the father has continued to pay post-majority child support during the pendency of the appeal.

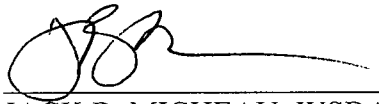
The father appeals the trial court decision based upon the fact that his support obligation did not terminate at least as of August 2010, and based upon the oral ruling of the court that the post-majority support obligation would continue indefinitely based upon the alleged disability of the child. The father did challenge whether the mother and child had met their burden of proof in this indefinite extension, but hinges his appeal more on the fact that his support obligation should have completely terminated no later than August 2010, if not as early as November 2009.

The mother has cross-appealed alleging that the trial court improperly excused the father from paying for Phoenix University, and improperly modified the post-secondary support obligation to reduce the amount the father would pay at a state institution. The state institution argument is irrelevant and moot because the child has never been enrolled at a state institution, even though she had notice that the father would have been required to pay half the cost thereof.

The father's appeal should be granted and his entire support obligation—post-majority and post-secondary support--should be terminated as of the end of August 2010. The mother's cross-appeal and request for attorney fees, should be dismissed as rulings entirely within the discretion of the trial court, which held a lengthy evidentiary hearing.

Dated: March 23, 2012.

Respectfully submitted,



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